Office - Supreme Court, U.S.
FILED
NOV 16 1984
ALEXANDER L. STEVAS
CLERK

No. 84-195

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

OHIO POWER COMPANY,
Petitioner,
v.
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF IN RESPONSE TO BRIEF IN OPPOSITION

EDWARD BERLIN
Counsel of Record for Petitioner
FRANCIS S. BLAKE
SWIDLER, BERLIN & STRELOW, CHARTERED
1000 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 342-5500

A. JOSEPH DOWD
JEFFREY P. WHITE
OHIO POWER COMPANY
E. DONALD ELLIOTT
Box 401A Yale Station
New Haven, Connecticut 06520
Of Counsel

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
ARGUMENT	1
CONCLUSION	10

TABLE OF AUTHORITIES

Cases:

American Meat Institute v. EPA, 526 F.2d 442 (7th Cir. 1975)	4
Camp v. Pitts, 411 U.S. 138 (1973)	2
Central Power & Light Co. v. United States, 634 F.2d 137 (5th Cir. 1980)	3
Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1972)	2
Columbus & Southern Ohio Electric Co. v. Costle, 638 F.2d 910 (6th Cir. 1980)	7
CPC International, Inc. v. Train, 515 F.2d 1032 (8th Cir. 1975)	4
Duquesne Light Co. v. EPA, 522 F.2d 1186 (3rd Cir. 1975)	3
FMC Corp. v. Train, 539 F.2d 973 (4th Cir. 1976)	4
Ford Motor Co. v. NLRB, 305 U.S. 364 (1939)	5
FPC v. Transcontinental Gas Pipe Line Corp., 423 U.S. 326 (1976)	7
Friends of the Earth v. EPA, 499 F.2d 1118 (2nd Cir. 1974)	3
Harrison v. PPG Industries, Inc., 446 U.S. 578 (1980)	2
International Harvester Co. v. Ruckelshaus, 478 F.2d 615 (D.C. Cir. 1973)	2
Kennecott Copper Corp. v. EPA, 462 F.2d 846 (D.C. Cir. 1972)	2
New England Coalition on Nuclear Pollution v. NRC, 727 F.2d 1127 (D.C. Cir. 1984)	3
Sharon Steel Corp. v. EPA, 597 F.2d 377 (3rd Cir. 1979)	3
South Terminal Corp. v. EPA, 504 F.2d 646 (1st Cir. 1974)	2

TABLE OF AUTHORITIES—Continued

Page

State of New Jersey v. EPA, 626 F.2d 1038 (D.C. Cir. 1980) 3
United States Steel Corp. v. EPA, 649 F.2d 572 (8th Cir. 1981) 4
Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519 (1978) 4
Western Oil & Gas Ass'n. v. EPA, 633 F.2d 803 (9th Cir. 1980) 4

Constitution:

U.S. CONST. Art. III, § 2, cl. 1 4

Statutes:

Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:
5 U.S.C. 701-706 4
5 U.S.C. 706(2)(A) 4

Miscellaneous:

49 Fed. Reg. 37,644 (1984) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-195

OHIO POWER COMPANY,
Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
WILLIAM D. RUCKELSHAUS, ADMINISTRATOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF IN RESPONSE TO BRIEF IN OPPOSITION

ARGUMENT

Respondents' Brief in Opposition states that "[t]he question presented by the petition . . . is . . . simple—whether a court may properly remand an agency's determination on one issue for further consideration without also vacating the overarching rulemaking." Opp. at 8. Having "simply" stated the question, respondents assert that there is no conflict among the circuits and that, in any event, any error below was "harmless." Respondents' assertions are both legally and factually inaccurate.

Respondents have misstated the issue before the Court. The question is not whether a reviewing court may remand an issue for further consideration without vacating the overarching rulemaking. As petitioner pointed

out, this Court has held that a remand for further consideration of an issue is appropriate *if the record on review is inadequate to permit informed judicial review.* Pet. 8-9; *Harrison v. PPG Industries, Inc.*, 446 U.S. 578, 594 (1980); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1972); *Camp v. Pitts*, 411 U.S. 138, 143 (1973). This type of remand, commonly referred to as an *Overton Park* remand, is issued to aid the court in performing its review function when the agency's rationale is unclear from the record. The remand at issue in this case, however, is not an *Overton Park* remand. The record before the Sixth Circuit was adequate for judicial review; the court had no difficulty discerning the agency's rationale for its action; and the court specifically found that the agency's action was "arbitrary and capricious." Pet. App. 16a. Thus, the question before this Court is a substantial one: whether a reviewing court must vacate an agency action found to be arbitrary and capricious or whether, instead, the reviewing court may allow an agency on remand to reconsider only an issue, with no concurrent obligation to repromulgate its invalid action.

On that question, there is a conflict among the circuits. Pet. 6-7. Respondents present a lengthy string of citations in support of the assertion that there is no conflict and that remand for reconsideration of an issue has been recognized in "[v]irtually every circuit." Opp. at 10-11, nn.11, 12. These citations miss the point. The bulk of the cases cited involve an *Overton Park* remand where the record was inadequate for judicial review;[1]

---

[1] *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 650 (D.C. Cir. 1973) ("The Administrator's decision did not reach these questions and accordingly we must remand for further consideration."); *Kennecott Copper v. EPA*, 462 F.2d 846, 850 (D.C. Cir. 1972) ("[T]he record is remanded for the Administrator to supply an implementing statement that will enlighten the court as to the basis on which he reached the . . . standard."); *South Terminal Corp. v. EPA*, 504 F.2d 646, 665 (1st Cir. 1974) ("remand- for-

the remainder bear out petitioner's position that there is a clear conflict among the circuits.[2]

In an attempt to bolster the claim that the Sixth Circuit's decision in this case presents nothing unusual and no significant legal issue, respondents characterize petitioner's argument as advocating "'all or nothing' review" and state that it is "impractical to require EPA to 'start from scratch' each time a court finds error. . . ." Opp. 10-11. This inappropriate characterization exemplifies precisely the problem that petitioner believes this Court should address. It is no doubt more convenient for both the reviewing court and the agency to focus on a single issue (here, the Class A coefficients) in isolation from the agency's action (here, the emission limitation). But this "improvement" in the administra-

---

explanation" based on "further hearings and an extended record"); *Friends of the Earth v. EPA*, 499 F.2d 1118, 1125 (2d Cir. 1974) ("We do not conclude that the Administrator was necessarily in error . . . [b]ut we believe that a further explanation by the Administrator is necessary."); *Duquesne Light Co. v. EPA*, 522 F.2d 1186, 1196 (3rd Cir. 1975) ("While we are unable, on the present record, to uphold the Administrator's determination regarding economic feasibility, we cannot say his conclusion was necessarily incorrect. . . . Accordingly, the plan will be returned to the agency for clarification.").

[2] Many of the cases cited by respondents clearly conflict with the Sixth Circuit's decision in that the courts in those cases specifically set aside the agency action found to be unsupported by the record. *State of New Jersey v. EPA*, 626 F.2d 1038, 1050 (D.C. Cir. 1980) ("We therefore set aside only those challenged designations and remand the record for reconsideration of them."); *New England Coalition on Nuclear Pollution v. NRC*, 727 F.2d 1127, 1131 (D.C. Cir. 1984) ("Where agency action must be set aside as invalid . . . a reviewing court will ordinarily remand to enable the agency to enter a new order after remedying the defects that vitiated the original action. Accordingly, we remand . . . ."); *Sharon Steel Corp. v. EPA*, 597 F.2d 377, 381 (3rd Cir. 1979) ("exercise [of] equitable powers" to "leave the challenged rule in effect except as to the specific designations contested in this case"); *Central Power*

tive process violates the Administrative Procedure Act,[3] disregards this Court's admonition that courts should refrain from the temptation to gerrymander the administrative process,[4] and ignores the proper function of judicial review, which is to review agency actions, not abstract issues.[5]

& Light Co. v. United States, 634 F.2d 137, 177 (5th Cir. 1980) (holding that the "evidence is insufficient to support the Commission's findings . . . and those findings are accordingly vacated.").

On the other hand, several cases cited by respondents tend to support the Sixth Circuit's approach, in that the courts in these cases claim the power to remand abstract issues while leaving agency action in effect even after it has been found unsupported by the record. *FMC Corp. v. Train*, 539 F.2d 973, 980 (4th Cir. 1976) ("We . . . direct EPA to re-examine its use of uniform hydraulic flows for purposes of calculating the regulations"); *American Meat Institute v. EPA*, 526 F.2d 442, 467 (7th Cir. 1975) ("EPA may conclude, on reconsideration, that evidence in the existing record on which it did not previously rely is adequate to support the limitations."); *United States Steel Corp. v. EPA*, 649 F.2d 572, 577 (8th Cir. 1981) ("we deem it appropriate to leave the challenged designations in effect"); *CPC International Inc. v. Train*, 515 F.2d 1032, 1050 (8th Cir. 1975) (on remand, EPA may "either furnish support for the new source standards previously published, or establish new ones"); *Western Oil & Gas Ass'n. v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (in exercise of "discretion to shape equitable remedy, we leave the challenged designations in effect.").

[3] Respondents and petitioner agree that the Administrative Procedure Act, 5 U.S.C. §§ 701-706, establishes the relevant standard in this case. Opp. at 8-9, n.7. The Act directs courts to "set aside" arbitrary and capricious "actions, findings and conclusions." 5 U.S.C. § 706(2)(A). Respondents suggest that the phrase "actions, findings and conclusions" can be read in the disjunctive, thus allowing a court to choose whether to set aside an "action," a "finding" or a "conclusion." Opp. at 12. There is no support for such a reading of the Act, and, indeed, such a reading would invite advisory opinions on "findings" and "conclusions." The touchstone of judicial review is the agency's *action*, as is recognized by the Act's use of the conjunctive "and."

[4] *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978).

[5] U.S. CONST., Art. III, § 2, cl. 1.

The characterization of petitioner's claim as requiring the agency to "start from scratch" makes it appear that petitioner is requesting the agency to go through some meaningless procedural exercise. That is not the case. Petitioner does not maintain that the entire Ohio State Implementation Plan must be set aside because one emission limitation was found to be arbitrary and capricious; instead, its position is simply that the particular agency action found to be invalid must be set aside, rather than left in effect and an abstract "issue" remanded for reconsideration.

Respondents' reliance on *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939), is entirely misplaced. There this Court emphasized that the remand to the agency was of the entire "cause" of action, not simply a distinct issue (*id.* at 373) and stressed that the effect of the remand was to vacate the agency's "findings and order." *Id.* at 375. Petitioner here is pressing the fundamental point that the agency, having studied Class A, must apply those same facts in reaching its final action. In other words, the facts found by the agency must support the action taken. Here the court's remand on an "issue" allowed the agency to separate its factual finding from its action. It must be emphasized that the only issue the Sixth Circuit reviewed was "whether or not the EPA, on remand, has properly carried out this court's mandate *to undertake further study* of the basis for the use of Class A coefficients." App. 5a (emphasis added). The court *refused* to address the issue of whether the agency's study of the Class A coefficients supported the agency's emission limitation. *Id.*

Respondents' contention that this issue is "harmless" is unfounded. Respondents concede that the agency used a different computer model in supporting the Class A coefficients than it used in establishing the emission limitation. Opp. at 14. Respondents also concede that this model was more accurate than the model that had been used to set petitioner's emission limitation. *Id.* Respond-

ents then, however, state that the differences between the new and old model are "insignificant." *Id.* This is not true. The agency did find that the differences between the two models were "insignificant in almost all cases." Pet. App. 89a. The agency did not find that the differences between the two models are insignificant for purposes of setting an emission limitation in *this* case. In fact, the two models generate significantly different emission limitations, and the difference amounts to a cost of approximately $29 million per year for petitioner. Contrary to respondents' claim, this is not "speculation" on petitioner's part. Opp. at 13. The Ohio Environmental Protection Agency has calculated the emission limitation that would result from the factual predicate established by the agency in its Class A "study," and the resulting emission limitation is substantially different than the emission limitation set by the agency in 1976. Indeed, EPA is now reviewing Ohio EPA's proposed revision to the emission limitation, and has indicated no disagreement with Ohio EPA's calculation. 49 Fed. Reg. 37,644 (Sept. 25, 1984).

It is unnecessary, however, for this Court to decide whether the factual predicate supporting the Class A "study" also supports a different emission limitation. The critical point is that the Sixth Circuit refused to review that issue. Its "improvement" on the administrative process was to allow the agency to study a single issue on remand without connecting that study to the ultimate issue—the agency's emission limitation. And then on review of the agency's study, the court limited its review to the "single issue" of whether the agency had adequately conducted the study. Pet. App. 6a. The question whether the study supported the emission limitation was explicitly ruled beyond the scope of review. As a consequence, petitioner was denied review of the central issue—the validity of the ultimate agency action, the emission limitation. *Id.* Petitioner submits that the propriety of such an approach to the review of adminis-

trative action—an approach that has been adopted by some circuits and rejected by others—raises fundamental legal issues warranting this Court's review.

Finally, respondents contend, albeit in a half-hearted manner in a footnote, Opp. at 7 n.5, that petitioner did not raise this issue in a timely fashion, and respondents intimate that petitioner should have sought certiorari from the Sixth Circuit's 1978 remand order. *Id.* Neither claim has merit. First, it would clearly have been inappropriate for petitioner to seek certiorari after the Sixth Circuit's 1978 decision. Petitioner was, after all, successful in that case, since the Sixth Circuit had ruled that the agency's action was arbitrary and capricious. Pet. App. 16a. Unlike the situation in *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976), the effect of the court's 1978 remand was not "immediate and irreparable." On the contrary, there is no dispute that on remand EPA was to reconsider the use of Class A coefficients in setting emission limitations. Assuming that the agency was acting in good faith, the reconsideration ordered by the court might have lead EPA to modify the emission limitation for Ohio Power's plant, thereby making it unnecessary for this Court to confront the issue now presented. For this reason alone, a petition for certiorari would not have been ripe in 1978.

There is a more fundamental reason why petitioner could not have sought certiorari in 1978. A fair reading of the Sixth Circuit's 1978 decision indicates that the court did set aside the emission limitation which it explicitly found to be "arbitrary and capricious." Any possible ambiguity on this point appeared to have been resolved in petitioner's favor when the same panel in a related case explicitly construed its 1978 opinion as having "set aside EPA's emission limits. . . ." *Columbus & Southern Ohio Electric Co. v. Costle*, 638 F.2d 910, 911 (6th Cir. 1980). Respondents now attempt to dismiss

the court's interpretation of its own prior opinion as "off-handed," Opp. at 8, n.6, but it is clearly unreasonable to expect petitioner to have sought certiorari from a reading of the Sixth Circuit's opinion which that court itself rejected.

The fact is that it was only after EPA consciously chose not to follow the proper procedures for setting an emission limitation on the remand that the Sixth Circuit reversed its field and declared retroactively that the emission limitation had never been set aside after all.[6]

Petitioner repeatedly raised its contention that the law requires that an emission limitation found to be arbitrary and capricious must be set aside. Petitioner first raised the issue in its comments to EPA during the remand, and EPA explicitly addressed the point in its decision, maintaining that its action "consists of the compilation of a supplemental record to support the originally promulgated emission limitations" rather than "promulgation of new emission limitations. . . ." Pet. App. 58a. Petitioner pressed its contention before the Sixth Circuit in its opposition to EPA's motion to supplement the original record.[7] One of the major subheadings in petitioner's initial brief on the merits was that "the Agency Never Promulgated Emission Limitations

---

[6] Respondents state that "[t]he only issue raised in the petition involves the format of the 1978 decision." Pet. 7. That is incorrect. The central point raised in this Petition involves the Sixth Circuit's 1984 decision construing its 1978 decision, and concluding that the agency's obligation on remand extended only to consideration of the Class A issue in isolation of the emission limitations. It is the Sixth Circuit's refusal—in 1984—to address whether the facts found by the agency in the remanded proceeding supported the emission limitation which forms the basis of petitioner's grievance.

[7] Memorandum in Opposition to Respondents' Motion to Consolidate and to Supplement the Certified Index to the Record, November 14, 1980, pp. 3-4.

to Replace Those Set Aside by this Court." [8] Petitioner reiterated in its reply brief that the proper question before the court "concerns emission limitations," not the issue of Class A coefficients in the abstract,[9] and made the issue of the inconsistency between EPA's study of the Class A "issue" and the emission limitations the central focus of its oral argument.

The Court of Appeals understood petitioner's position that EPA was legally required to set new emission limitations to replace those which had been found to be arbitrary and capricious in 1978. The court explicitly rejected petitioner's argument by stating that it had "limited the remand to a single issue [the use of Class A coefficients]." Pet. App. 6a. Petitioner then filed a request for rehearing limited to the issue raised in the petition for certiorari.

Under these circumstances, there is no merit to respondents' position that petitioner did not preserve the issue below, or that it should have sought certiorari in 1978.

---

[8] Brief for Group I Petitioners, October 9, 1981, pp. 71-75.

[9] Reply Brief for Group I Petitioners, February 12, 1982, pp. 16-26.

CONCLUSION

The petition for certiorari raises an important issue of administrative law on which the lower courts have reached diverse and inconsistent results, and which is squarely presented by the decision below. Therefore, petitioner respectfully requests that this Court grant the petition.

Respectfully submitted,

EDWARD BERLIN
Counsel of Record for Petitioner
FRANCIS S. BLAKE
SWIDLER, BERLIN & STRELOW, CHARTERED
1000 Thomas Jefferson St., N.W.
Washington, D.C. 20007
(202) 342-5500

A. JOSEPH DOWD
JEFFREY P. WHITE
OHIO POWER COMPANY
E. DONALD ELLIOTT
Box 401A Yale Station
New Haven, Connecticut 06520
Of Counsel

November 17, 1984